Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18
	)	
AIRPEAK Communications, LLC 800 MHz ESMR Election, Request for Waiver	)	
	)	
Airtel Wireless, LLC 800 MHz ESMR Election, Request for Waiver	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 3, 2005 **Released:** October 5, 2005

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order (*MO&O*), we address petitions for reconsideration, a request for waiver and a request for declaratory ruling submitted in the 800 MHz Public Safety proceeding, specifically: petitions for reconsideration of the Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order (*800 MHz R&O*), petitions for reconsideration of the Commission's Supplemental Order and Order on Reconsideration (*Supplemental Order*), a petition for declaratory ruling submitted by Nextel, the Association for Maximum Service Television, Inc., and the National Association of Broadcasters, and a petitions for waiver of ESMR election criteria filed by AIRPEAK Communications, LLC (Airpeak) and Airtel Wireless, LLC.

2. The *800 MHz R&O*, released August 6, 2004, adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.[1] The Commission addressed the ongoing interference problem over the short-term by adopting technical standards defining unacceptable interference in the 800 MHz band and detailing responsibility for interference abatement.[2] The Commission further determined that solving the interference problem for the long-term necessitated reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference.[3] Accordingly, the Commission adopted a new band plan for the 800 MHz band and established a transition mechanism for licensees in the band to relocate to their new spectrum assignments. On December 22, 2004, the Commission issued a *Supplemental Order* making certain clarifications of, and changes to, the provisions of the *800 MHz R&O* and its accompanying rules.[4]

II. EXECUTIVE SUMMARY

3. Specifically, in this *MO&O*, we:

- amend the definition of an Enhanced Specialized Mobile Radio (ESMR) system;
- further delineate the relocation rights of 800 MHz incumbent licensees;
- narrow the Expansion Band in the Atlanta, Georgia region;

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[1] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) *as amended by Erratum*, 19 FCC Rcd 19651 (WTB PSCID 2004) and *Erratum*, 19 FCC Rcd 21818 (WTB PSCID 2004) (*800 MHz R&O*).

[2] *See 800 MHz R&O*, 19 FCC at Rcd 15021-15045 ¶¶ 88-141 (adopting new technical standards for protecting public safety, critical infrastructure and other 800 MHz "high-site" licensees from "unacceptable" interference).

[3] *See id.*, 19 FCC Rcd at 15045-15079 ¶¶ 142-209 (adopting a new 800 MHz band plan spectrally separating public safety and critical infrastructure users and other "high-site" licensees from Enhanced Specialized Mobile Radio (ESMR) systems using "low-site" architecture).

[4] *See* Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) (*Supplemental Order*).

- reaffirm the Commission's authority to grant Nextel Communications, Inc. (Nextel) spectrum rights to ten megahertz of spectrum in the 1.9 GHz band;
- permit the Transition Administrator (TA) to follow a calendar year for reporting schedule purposes;
- permit Nextel to receive credit in the 800 MHz 'true-up' process for the relocation of certain additional BAS incumbent licensees whose licenses were issued prior to November 12, 2004; and
- clarify the definitions of "unacceptable interference" and "Critical Infrastructure Industries" (CII).

4. We decline to:

- publish a table of frequency assignments as part of band reconfiguration;
- require frequency coordination for all band reconfiguration applications;
- allow CII licensees to relocate out of the Expansion Band;
- change the Commission's valuation of spectrum rights in the 1.9 GHz and 800 MHz bands;
- exempt certain public safety licensees from the application freeze;
- extend the mandatory negotiation periods for Broadcast Auxiliary Service (BAS) incumbents in the 1.9 GHz band;
- amend the reimbursement rights of Mobile Satellite Service (MSS) licensees that commenced operation in the 1.9 GHz band subsequent to the BAS relocation deadline but before the 800 MHz true-up period; and
- address 900 MHz interference and spectrum trafficking issues that are outside the scope of this proceeding.

III. BACKGROUND

5. The interference problem in the 800 MHz band is caused by a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems, used by ESMR and cellular telephone licensees, and high-site non-cellular systems used by public safety, private wireless, and some SMR licensees.[5] In 2002, the Commission issued a *Notice of Proposed Rule Making (800 MHz NPRM)* seeking comment on band reconfiguration and on a variety of related issues affecting abatement of interference to 800 MHz public safety systems.[6] The *800 MHz R&O* was grounded on the

[5] *See 800 MHz R&O*, 19 FCC Rcd at 14972-73 ¶ 2.

[6] *See* Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rule Making*, WT Docket No. 02-55, 17 FCC Rcd 4873, 4482 ¶ 16 (2002), as modified by *Erratum*, 17 FCC Rcd 7169 (PSPWD 2002) (*800 MHz NPRM*).

extensive record developed in response to the *800 MHz NPRM*. The *Supplemental Order* clarified and modified certain provisions of the *800 MHz R&O* and its accompanying rules.

6. We have before us petitions for reconsideration of the *800 MHz R&O*, oppositions to those petitions and replies to those oppositions, and petitions for reconsideration of the *Supplemental Order* and related oppositions and replies.[7] Because the *Supplemental Order* revised, in some respects, the provisions of the *800 MHz R&O*, some petitions for reconsideration of the *800 MHz R&O*, filed before the *Supplemental Order* was released, request relief that was later granted in the *Supplemental Order*. To that extent, some issues raised in petitions for reconsideration were rendered moot.[8] Accordingly, we

[7] Petitions for reconsiderations of the *800 MHz R&O* were due on December 22, 2004. *See* 69 Fed Reg. 67823 (2004) and 47 C.F.R. § 1.429(d). Petitions for reconsideration of the *Supplemental Order* were due on March 10, 2005. *See* 70 Fed Reg. 6757 (2005) and 47 C.F.R. § 1.429(d). On February 14, 2005, the Public Safety and Critical Infrastructure Division (Division) of the Wireless Telecommunications Bureau (Bureau) harmonized the opposition and reply periods of the *800 MHz R&O* with those of the *Supplemental Order*. *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, 20 FCC Rcd 3568 (WTB PSCID 2005).

For short-form citation purposes we refer to petitions for reconsideration of the *800 MHz R&O* as [Party Name] PFR (of R&O) and petitions for reconsideration of the *Supplemental Order* as [Party Name] PFR (of Supplemental Order). Since the pleading schedule created, in essence, a consolidated opposition and reply to oppositions period we refer to oppositions and replies as follows, [Party Name]Opposition; [Party Name] Reply.

[8] In the *Report and Order* we prohibited non-ESMR (*i.e.* high-site) operations in the ESMR band. That decision was the subject of three petitions for reconsideration seeking to permit non-ESMR Economic Area (EA) licensees to relocate to the ESMR band. *See* Preferred Communications Systems, Inc. and Silver Palm Communications, Inc. Petition for Reconsideration, filed Dec, 22, 2004 (Preferred PFR (of R&O)) at 32-33; Joint Petition for Partial Reconsideration of Coastal SMR Network L.L.C./A.R.C., Inc. and Scott C. MacIntyre, filed Dec. 22, 2004 (Coastal PFR (of R&O) at 31-32; and Petition for Reconsideration of Charles D. Guskey, filed Dec. 22, 2004 (Guskey PFR (of R&O)) at 10-11. The Commission's decision in the *Supplemental Order* giving EA licensees not currently operating ESMR systems the option to relocate their EA systems to the ESMR portion of the band moots this aspect of the above-mentioned petitions. *See also Supplemental Order*, 19 FCC Rcd 25153-57 ¶¶ 75-84.

The Commission's setting out the licensing and construction requirements for ESMR-vacated spectrum moots aspects of petitions for reconsideration filed by Entergy Corporation and Entergy Services, Inc. (Entergy) and American Electric Power Company, Inc. (AEP). *See* Petition for Reconsideration of Entergy Corporation and Entergy Services, Inc. (Entergy), filed Dec. 22, 2004 (Entergy PFR (of R&O)) at 5-6 and Petition for Clarification of American Electric Power Company, Inc., filed Dec. 21, 2004 (AEP PFR (of R&O)) at 4-6. *See also Supplemental Order*, 19 FCC Rcd 25144-49 ¶¶ 57-68.

The Commission's clarifying the rights of incumbents operating on former channels 121-150 moots aspects of the petition for reconsideration filed by AEP. *See* AEP PFR (of R&O) at 7-8; *see also Supplemental Order*, 19 FCC Rcd 25146-47 ¶ 61.

The Commission's decisions regarding the amount of information licensees submitting interference complaints must provide commercial mobile radio system (CMRS) providers, as well as when an electronic database must be placed into operation, moots portions of a petition for reconsideration filed by CTIA-The Wireless Association. *See* Petition for Reconsideration, filed Dec. 22, 2004, by CTIA-The Wireless Association (CTIA PFR (of R&O)) at 2-3. *See also Supplemental Order*, 19 FCC Rcd 25141-43 ¶¶ 46-50.

do not address those issues further in the instant *MO&O* except to note that they were addressed and resolved by the *Supplemental Order*[9]. We now turn to the remaining issues before us.

IV. DISCUSSION

A. Cellular Systems that May Operate in the ESMR Portion of the 800 MHz Band

7. In the *800 MHz R&O*, the Commission established a definition of "high-density cellular" to delineate those systems that are precluded from operating in the non-ESMR portion of the 800 MHz band.[10] Several 800 MHz licensees express concern, however, that this same high-density cellular definition is also being used to limit access to the ESMR portion of the band.[11] They note that the Transition Administrator (TA) has required licensees seeking to relocate to the ESMR portion of the band to certify that they meet the high-density cellular definition in the Commission's rules.[12] The potential effect of this, these parties contend, would be to preclude certain incumbent licensees with cellular-architecture systems that do not meet the high-density criteria from relocating to or remaining in the ESMR band. Airpeak, for example, asserts that strictly applying the high-density criteria could

[9] Additionally, we decline to address the request of Consolidated Edison Company of New York, Inc. (ConEd) seeking clarification on which channels its itinerant operations will be relocated to. *See* Petition for Clarification and Reconsideration, filed Dec. 22, 2004, by Consolidated Edison Company of New York, Inc. (ConEd PFR (of R&O)) at 3-5. This is a matter for the Transition Administrator. Thus, we will not address it in this *MO&O*.

[10] Herein, we refer to the 800 MHz band as being divided into two parts, the "ESMR" and "non-ESMR" portions. The ESMR portion of the band extends from 817 MHz/862 MHz to 824 MHz/869 MHz in most of the country and from 813.5 MHz/858.5 MHz to 824 MHz/869 MHz in the Southeast area. The non-ESMR portion of the band extends from 806/851 MHz to the lower limit of the ESMR portion of the band in all areas of the country. *See 800 MHz R&O*, 19 FCC Rcd at 15051-52, 15058 ¶¶ 151, 166.

A cellular system may not operate in the non-ESMR portion of the band if such system is a "high density" system, which is defined as: (1) having more than five overlapping interactive sites featuring hand-off capability; and (2) any one of such sites has an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies. *800 MHz R&O*, 19 FCC Rcd at 15060 ¶ 172; 47 C.F.R. § 90.7.

[11] *See ex parte* letter from Elizabeth Sachs, counsel to Airpeak, to Cathy Seidel, Acting Chief, Wireless Telecommunications Bureau, dated May 12, 2005. *See also, ex parte* letter from Senator Lindsey Graham and Senator Jim DeMint, to Chairman Kevin Martin, Federal Communications Commission, dated May 16, 2005 (advocating allowing SMR licensees that do not meet the high-density cellular criteria to relocate to the ESMR portion of the band); Letter from Robert Ritter, counsel for North Point Communications, Inc., to 800 MHz Transition Administrator, dated May 12, 2005, at 2, n.5 (asserting that North Point's systems are eligible for relocation to the ESMR portion of the band, notwithstanding the fact that they do not employ twenty or more paired frequencies).

[12] *See* 800 MHz Transition Administrator Accepting EA Licensee Relocation Elections, *Press Release* dated Apr. 21, 2005, stating: "If electing to move to the ESMR Band or remain in the ESMR Band, [a licensee must file] a certification that: (1) the licensee has the spectrum capacity to build and operate an ESMR system pursuant to the definition of ESMR in Section 90.7 of the FCC's rules (which includes having more than five overlapping interactive sites with hand-off capability and one such site with an antenna height of less than 30.4 meters (100 ft.) above ground level and a HAAT of less than 152.4 meters (500 ft.) and 20 or more paired frequencies); and (2) the licensee intends to operate an ESMR system within the ESMR Band."

exclude its system and other iDEN-based systems from relocating to or remaining in the ESMR portion of the band.[13]

8. We agree that these licensees have raised a legitimate concern that requires clarification of our rules. We intended the term "high density cellular," as defined in our 800 MHz rules, only as a limitation on the kind of cellular system that is prohibited in the non-ESMR portion of the 800 MHz band. It was not our intent that this definition should limit eligibility for operation in or relocation to the ESMR band, or to exclude other cellular-architecture systems, *e.g.*, iDEN-based systems, that do not meet the high-density criteria. We recognize, however, that the Commission may have drafted the definition in a way that led the TA and others to interpret its requirements differently. Therefore, we amend and clarify our rules to provide a broader definition of "800 MHz cellular systems" that may operate in the ESMR portion of the band. Specifically we define a "800 MHz cellular system" as a system that uses multiple, interconnected, multi-channel transmit/receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-cellular technology. Under this definition, conventional "high site" systems continue to be excluded, but iDEN-based and other cellular systems are not.[14]

9. Given our clarification of the rules for operating in the ESMR band, we believe that licensees with cellular-architecture systems who do not meet the definition of high density cellular should be given the opportunity to file ESMR elections. In addition, in light of the rule changes discussed at paragraphs 11-28 *infra*,[15] we believe that licensees who have already selected ESMR status should have the opportunity to modify their previous elections. We therefore direct the TA to open a twenty-day window during which (i) licensees with cellular architecture systems who do not meet the definition of high density cellular may file new elections to relocate to the ESMR portion of the band, and (ii) licensees who have already selected ESMR status can modify their previous elections, consistent with the rules as amended.[16]

B. Relocation of Incumbent Licensees into the ESMR Portion of the 800 MHz Band

10. A number of parties seek reconsideration of our rules regarding the rights of incumbent licensees to relocate or operate in the ESMR band.[17] In the paragraphs below, we address the petitions for reconsideration pertaining to these issues and modify and clarify certain aspects of our rules.

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[13] *See ex parte* letter from Elizabeth Sachs, counsel to Airpeak, to Cathy Seidel, Acting Chief, Wireless Telecommunications Bureau, dated May 12, 2005.

[14] *See* 47 C.F.R. § 90.7 in Appendix B *infra*.

[15] Among other things, we provide that licensees who move to the ESMR band but who do not construct their licenses will forfeit their licenses. *See* ¶ 27 *infra*.

[16] While we direct the TA to open an additional twenty-day election window, we commit to the TA's discretion the date on which such window must open. We do, however, urge the TA to act promptly.

[17] *See* Petition for Reconsideration, filed Mar. 10, 2005, by AIRPEAK Communications LLC, (Airpeak PFR (of Supplemental Order) at 5-9); Petition for Partial Reconsideration of the Safety and Frequency Equity Competition Coalition, filed Mar. 10, 2005 (SAFE PFR (of Supplemental Order)) at 3-4.

1. Relocation Rights of EA-Licensees Operating ESMR Systems in the Non-ESMR Portion of the Band

11. The *800 MHz R&O* provided that 800 MHz EA licensees operating ESMR systems in the non-ESMR portion of the band have the option to relocate into the ESMR portion of the band.[18] EA licensees who exercise this option to relocate are to receive equivalent, encumbrance-free EA licenses in the ESMR band, and are entitled to relocate their systems at Nextel's expense.[19] The TA has received elections to relocate from four EA licensees (in addition to Nextel and SouthernLINC) that were operating ESMR systems on November 22, 2004, the date of Federal Register publication of the *800 MHz R&O*.[20]

12. In the *800 MHz R&O,* the Commission also recognized that some EA licensees operating ESMR systems had site-based licenses for base stations that were an integral part of their ESMR systems, but which operated on channels outside the channel block comprising the EA license.[21] The Commission gave these licensees the option to relocate their site-based licenses, together with their EA licenses, to the ESMR portion of the band, provided that they: (a) currently hold an EA license in the relevant market; and (b) have been using the site-based license as part of a cellular-architecture system in that market as of the Federal Register publication date of the *800 MHz R&O*.[22]

13. In the *Supplemental Order,* the Commission specified that a site-based license is integral to an ESMR system if (1) the 40 dBμV/m coverage contour of the station overlaps the 40 dBμV/m coverage contour of another cell in the ESMR system, and (2) the station is capable of "hand-off" of calls to and from one or more overlapping cells.[23] The Commission further specified that in order for a site-based license to qualify for relocation, the station must have been operating as part of the EA licensee's EMSR system as of the date the *800 MHz R&O* was published in the Federal Register.[24] The Commission also stated that, when a site-based station is moved into the ESMR portion of the band, the associated license will be limited to the station's 40 dBμV/m coverage contour.[25] This was a modification of the *800 MHz*

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[18] *See 800 MHz R&O*, 19 FCC Rcd at 15056 ¶ 162; Transition Administrator Press Release, WT Docket 02-55, *Public Notice*, 20 FCC Rcd 668 (WTB 2005).

[19] *See Supplemental Order*, 19 FCC Rcd at 25154 ¶ 77.

[20] Elections have been submitted by AIRPEAK Communications, LLC; Airtel Wireless, LLC; Preferred Communications Systems, Inc., and Colorado Callcomm, Inc. *See* Regional Prioritization Plan of the 800 MHz Transition Administrator at 10-11 (Jan. 31, 2005). The TA also received correspondence from Nextel and SouthernLINC indicating their intent to relocate to the ESMR band. *See id.* at 12-13 (confirming receipt of Nextel, SouthernLINC ESMR elections).

[21] *See 800 MHz R&O*, 19 FCC Rcd at 15057 ¶ 163.

[22] *Id.*

[23] *Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 78.

[24] *Id.*

[25] *Id.*

R&O, in which the Commission provided that integrated site-based licenses would be converted to EA-wide, unencumbered licenses in the ESMR band.[26]

14. Airpeak seeks reconsideration of certain aspects of the *Supplemental Order* as they pertain to the rights of EA licensees with ESMR systems to relocate to the ESMR band.[27] To the extent that the Commission does not grant reconsideration, Airpeak also seeks the same relief on a waiver basis.[28] We consider Airpeak's reconsideration and waiver arguments on each issue jointly.

15. *Non-Overlapping Site-Base Stations.* First, Airpeak argues that all site-based cells currently integrated into an ESMR network—not just those having an overlapping 40 dBμV/m coverage contour with other integral site-based cells—should be eligible for relocation into the ESMR band.[29] In support of its argument, Airpeak notes that it has sites that are integrated into its network switch and are able to carry communications among its subscribers even though they do not have contours that overlap with other portions of the network.[30] Airpeak contends that this is a common feature of systems that serve rural areas, particularly in the earlier phases of system deployment. We agree with Airpeak that such sites may be regarded as integrated even if they do not have overlapping contours with other sites. Therefore, we grant that portion of Airpeak's petition for reconsideration and will allow licensees to present facts to the TA that may support a finding that non-overlapping stations are, in fact, an integral part of the licensee's EA-based system.[31] For example, and without limitation, a licensee could satisfy the "integrated communications system" standard by providing documentation establishing that the isolated station is served by the same switch as the EA-based system, and that the station's coverage area is part of the service area for subscribers to the EA-based system. Thus, we grant that portion of Airpeak's petition for reconsideration and direct the TA to evaluate such requests in light of the discussion above.

16. *Leased Stations.* Airpeak also submits that it should be able to relocate site-based facilities that it acquired through the Commission's spectrum lease authority that are integrated into its EA-based system.[32] We agree, and grant that portion of Airpeak's waiver request to the extent of directing the TA to consider site-based facilities Airpeak acquired through the spectrum lease process as potentially eligible for relocation to the ESMR portion of the band. However, Airpeak bears the burden of demonstrating to the TA that the leased station it wishes to relocate to the ESMR portion of the band was an integral part of its EA-based system as of the effective date of the *800 MHz R&O*. Airpeak must also

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[26] *Id.*

[27] *See* Petition for Reconsideration, filed Mar. 10, 2005, by AIRPEAK Communications LLC (Airpeak PFR (of Supplemental Order) at 5-9).

[28] AIRPEAK Communications, LLC 800 MHz ESMR Election, Request for Waiver, filed March 17, 2005 (Airpeak Waiver Request).

[29] Airpeak PFR (of Supplemental Order) at 8-9.

[30] *Id.*

[31] The EA-based systems need not be an ESMR system. *See* ¶ 25 *infra*.

[32] *See* Airpeak Waiver Request; Opposition of Nextel Communications, Inc. to Airpeak Request for Waiver, filed March 28, 2005 by Nextel Communications, Inc. at 9-10; Reply to Opposition to Request for Waiver, filed April 4, 2005, by AIRPEAK Communications, LLC (Airpeak Waiver Reply) at 8-9.

provide the consent of the licensee of the leased station. In making these provisions, we are informed by the arguments advanced by Airpeak to the effect that we would otherwise deprive existing subscribers of service from an outlying cell when it relocated to the ESMR band.[33]

17. *Conversion of Site-based Licenses to EA-wide Licenses.* Airpeak also seeks reconsideration or waiver of the Commission's decision in the *Supplemental Order* to define relocated site-based licenses associated with an ESMR system based on the station's 40 dBμV/m coverage contour, instead of the licensee receiving an EA-wide license as provided in the *800 MHz R&O*.[34] Airtel Wireless, LLC seeks similar relief.[35] Airpeak proposes that a site-based license or licenses eligible for relocation should be converted to an EA-wide license if the 22 dBμV/m contours of the site-based license or licenses cover at least fifty percent of the population within the EA.[36] Airtel argues for similar relief for a site-based license or licenses eligible for relocation whose 22 dBμV/m contours cover at least thirty-five percent of the population within the EA.[37] Airpeak argues that this is consistent with Section 90.685(b) of the Commission's rules whereby one-third population coverage is the first benchmark for demonstrating satisfactory spectrum utilization throughout a geographic area and two-thirds coverage is used to demonstrate conclusive evidence that the spectrum is being used productively.[38] Airpeak posits that a station that has already reached a fifty percent penetration level likely has captured the major population areas within the market.[39] Airtel argues that the relief it seeks is warranted by considerations of equity and administrative ease.[40]

18. We are not persuaded by Airpeak's argument for reconsideration on this issue, but we conclude that Airpeak and Airtel may be entitled to partial relief on a waiver basis. We will allow Airpeak and Airtel to obtain an EA-wide license in the ESMR band for any site-based license or licenses eligible for relocation, provided that it can demonstrate that the 40 dBμV/m contours of the site-based license or licenses cover at least fifty percent of the population within the EA. We believe the 40 dBμV/m contour represents a better metric for arguing coverage equivalency rather than the 22 dBμV/m contour proposed by Airpeak and Airtel. Section 90.693(b) defines the 40 dBμV/m contour as a 800 MHz site-based station's service area and the 22 dBμV/m contour as the area which can not be expanded for purposes of co-channel protection to other stations.[41]

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[33] Airpeak PFR (of Supplemental Order) at 8-9.

[34] *Id.* at 7, *citing 800 MHz R&O,* 19 FCC Rcd at 15057 ¶ 163, and *Supplemental Order,* 19 FCC Rcd at 25154-55 ¶ 78.

[35] Airtel Wireless, LLC, 800 MHz ESMR Election, Request for Waiver, filed March 25, 2005. (Airtel Waiver Request.)

[36] Airpeak PFR (of Supplemental Order) at 8.

[37] Airtel Waiver Request at 4.

[38] *Id.* at 8-9 *citing* 47 C.F.R. § 90.685(b).

[39] *Id.* at 9.

[40] Airtel Waiver Request at 4.

[41] *See* 47 C.F.R. § 90.693(b).

19. *Acquired Site-Based Licenses Not Integrated Prior to November 22, 2004.* Airpeak also seeks waiver of the requirement that site-based cells must have been operating as part of an integrated communications system as of the date the *800 MHz R&O* was published in the Federal Register. Airpeak asks that we allow it to relocate certain site-based stations that Airpeak had purchased from other licensees but had not integrated into its ESMR systems by the date the *800 MHz R&O* was published in the Federal Register.[42] Airpeak notes that it acquired licenses in three transactions after the August 6, 2004 release date of the *800 MHz R&O* but before November 22, 2004, the date the *800 MHz R&O* was published in the Federal Register.[43] Airpeak states that it had integrated approximately one-half of the acquired licenses into its ESMR systems by November 22, 2004 and that it intended to integrate the other site-based licenses by that date, but was prevented from doing so by: (1) time required to obtain zoning approvals; (2) delay in obtaining interconnection lines from the site-based cell to the ESMR switch; (3) the need to relocate the licensee sellers' customers to other services, and (4) other logistical difficulties encountered in acquiring site-based licenses and integrating them in a three and one-half month time frame.[44]

20. The Commission's underlying purpose of establishing a cutoff date in connection with relocation of site-based licenses into the ESMR band was to discourage licensees from seeking to acquire and relocate large numbers of site-based licenses to the ESMR band for speculative purposes. We believe, however, that Airpeak has presented sufficient facts to demonstrate that it acquired site-based licenses in order to enhance its existing service to subscribers—and not for any speculative purpose. We believe there are several factors meriting the grant of Airpeak's requested waiver: (1) Airpeak was operating an ESMR system in the EAs in which it acquired the site-based licenses; (2) Airpeak has shown that the majority of acquired licenses were needed to meet growing subscriber demand; (3) some of the acquired licenses were on channels lying within Airpeak's EA spectrum block; and (4) Airpeak exercised reasonable diligence in seeking to integrate the licenses into its system, and some of the delays it experienced were not within its control.

21. Moreover, we believe that unique or unusual factual circumstances are present when a licensee must convert site-based licenses to ESMR cells on such short notice. Although Airpeak could have acquired the site-based licenses before the *800 MHz R&O* was released, we credit its representation that negotiations were in progress before that date. We also recognize that, during the time the *800 MHz NPRM* was pending and the time the *800 MHz R&O* was released, sufficient uncertainty about how site-based licenses would be incorporated into the overall band reconfiguration process existed so that a business decision on whether to acquire site-based licenses was problematic.

22. We grant that portion of Airpeak's waiver to the extent of directing the TA to consider the subject site-based facilities as potentially eligible for relocation to the ESMR portion of the band. However, we direct Airpeak to provide additional detail to demonstrate the validity of its contention that the site-based licenses at issue can and will be integrated into Airpeak's ESMR systems. Specifically, with respect to the unconstructed licenses that Airpeak seeks to include for relocation, it must demonstrate to the TA that the 40 dBμV/m contours of the acquired stations either overlap the EA served

[42] *See* Airpeak Waiver Request at 12-14. Airpeak lists the relevant stations at Appendix C of the Waiver Request.

[43] *See ex parte* letter from Elizabeth R. Sachs, Counsel for Airpeak, to Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, dated July 6, 2005.

[44] *See id.*

by Airpeak's system or overlap the 40 dBμV/m contours of stations that link back to the EA. Additionally, Airpeak must demonstrate to the TA that the assignment of the subject licenses had been consummated by the date the *800 MHz R&O* was published in the Federal Register.

2. Relocation Rights of EA Licensees Operating Non-ESMR Systems in the Non-ESMR Portion of the Band

23. In the *Supplemental Order*, the Commission extended the option to relocate to the ESMR band to EA licensees that were not operating an ESMR system as of the Federal Register publication date of the *800 MHz R&O,* including those EA licensees that had not yet constructed any facilities.[45] The *Supplemental Order* also provided that such EA licensees would not receive unencumbered EA licenses in the ESMR band, but would be limited to a geographical licensing area corresponding to the unencumbered area in which they were entitled to operate before they relocated, *i.e.*, their "white area."[46] The *Supplemental Order* also made no provision for non-ESMR EA licensees to relocate associated site-based licenses.

24. In its petition for reconsideration of the *Supplemental Order*, the Safety and Frequency Equity Competition Coalition (SAFE)[47] urges us to allow non-ESMR EA licensees to relocate site-based as well as EA-based licenses to the ESMR band.[48] According to SAFE, the *Supplemental Order* does not eliminate the economic harm to SAFE members that acquired spectrum with the intention of constructing ESMR systems on their EA and site-based spectrum holdings, nor does it cure the ultimate harm to competition in the dispatch services market.[49] If granted access to the ESMR band, SAFE members propose to construct ESMR systems at their own expense.[50]

25. On reconsideration, we conclude that by providing EA licensees the opportunity to relocate their associated site-based licenses in conjunction with their EA licenses if they elect to move to the ESMR band, we are evaluating the systems as a whole (even if portions thereof are licensed on a non-EA basis), and we will thereby achieve more effectively the goal of placing these licensees in a position comparable to that they currently occupy. Therefore, we will allow non-ESMR EA licensees to relocate site-based stations that were part of the licensee's integrated communications system, as defined below,

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[45] *Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 79. The *Supplemental Order* thus rendered moot those portions of the Preferred PFR (of R&O) and the Guskey PFR (of R&O) that sought the ability to relocate non-ESMR EA licensees to the ESMR band. *See* n. 8, *supra*.

[46] *Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

[47] SAFE represents Coastal SMR Network, LLC; A.R.C., Inc., d/b/a Antenna Rentals Corp.; Skitronics, LLC; Waccamaw Wireless, LLC; CRSC Holdings, Inc.; and Silver Palm Communications, Inc. *See* Safety and Frequency Equity Competition Coalition, Petition for Reconsideration at 3-4 (Mar. 10, 2005) (SAFE PFR (of Supplemental Order)) at n.1. SAFE does not represent Mobile Relay Associates, a site-based SMR licensee. *See* Erratum filed by Mark Blacknell, Esq., on behalf of SAFE, (Mar. 21, 2005).

[48] Petition for Partial Reconsideration of the Safety and Frequency Equity Competition Coalition, filed Mar. 10, 2005 (SAFE PFR (of Supplemental Order)) at 3-4, and Joint Reply (May 2, 2005) (SAFE Reply).

[49] *See* SAFE PFR (of Supplemental Order) 3-4.

[50] *See id. See also* SAFE Reply at 3.

on the date the *800 MHz R&O* was published in the Federal Register. To qualify as part of an integrated communications system, a site-based station must be:

- located within the geographical boundaries of the relevant EA; or
- outside the geographical boundaries of the EA but with a 40 dBμV/m contour that intersects the EA boundary; or
- outside the geographical boundaries of the EA, but with a 40 dBμV/m contour that, in combination with other of the licensee's stations with mutually intersecting 40 dBμV/m contours, forms a contiguous footprint with the EA boundaries.

Alternatively, the licensee may seek to demonstrate to the TA that a non-overlapping site-based station is an integral part of the EA-based system, based on the same criteria discussed in paragraph 15 above. We note that any relocated site-based station is limited to the 40 dBμV/m service contour it had as of the Federal Register publication date of the *800 MHz R&O*.

3. Obligations of Relocating Licensees

26. We recognize that by allowing greater access to the ESMR portion of the band, we may be providing an incentive for relocating licensees to warehouse ESMR spectrum rather than employing it. As a deterrent to this behavior we now, on our own motion, place the following obligations on EA licensees electing to relocate to the ESMR portion of the band. EA licensees electing to relocate to the ESMR portion of the band must by the end of their license term:

- relocate their systems to the ESMR band (including applying for and receiving any necessary license modifications);[51]
- convert their systems, including any associated site-based facilities to ESMR technology;
- provide ESMR service by the end of their EA license term;[52] and
- no later than the expiration date of their EA license, certify that they have converted their entire system, including site-based stations,[53] to ESMR technology and are offering service to customers.[54]

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[51] If the site-based station is associated with an EA licensee currently operating a non-ESMR system, the EA licensee must pay all expenses associated with relocating site-based stations to the ESMR Band (*i.e.*, hardware, legal, engineering, etc.). If an EA licensee is operating a site-based station as part of an ESMR system, then Nextel shall pay to relocate the site-based station to the ESMR band.

[52] *See* 47 C.F.R. § 90.685(e) in Appendix B *infra*.

[53] All relocated site-based stations must act as cells and be interconnected to (be part of) the ESMR system.

[54] Such certification must be filed with the Commission within fifteen days of EA license expiration. *See* 47 C.F.R. § 1.946(d). Failure to provide a timely response may result in enforcement action, including monetary forfeiture, pursuant to Section 503(b)(1)(B) of the Communications Act and Section 1.80(a)(2) of the Commission's Rules. *See* 47 U.S.C. § 503(b)(1)(B) and 47 C.F.R. § 1.80(a)(2). *See also* Wireless (continued....)

27. Failure to certify the implementation of ESMR technology by the deadline will result in the automatic cancellation of the EA license (and any associated site-based authorizations the licensee has elected to relocate to the ESMR portion of the band) for failure to construct an ESMR system in the ESMR Band.[55] In such an event, the licensee's spectrum would revert to Nextel. For the reasons explained *supra* there is good reason for expanding the classes of EA licensees eligible to relocate to the ESMR portion of the band—and potentially reducing the amount of ESMR band spectrum available to Nextel in the process. If relocating EA licensees fail to use the spectrum by the end of their license term access to that spectrum shall revert back to Nextel.[56] We recognize that entities may wish to reconsider their ESMR election in light of this provision. For that reason we have directed the TA to open a twenty-day election window to allow such reconsideration.[57]

28. Our decisions, *supra*, strike an appropriate balance between our goal of ensuring equitable treatment of all licensees and our goal of alleviating unacceptable interference to public safety licensees. Requiring EA licensees located in the ESMR portion of the band to construct ESMR systems by a time certain has a threefold purpose: (1) it avoids replicating, in the ESMR band, the same incompatible mix of technologies that resulted in unacceptable interference to public safety, CII and other "high site" licensees; (2) it allows licensees genuinely interested in competing with existing ESMR operators to have the opportunity to move forward with their business plans; and (3) it requires relocating EA licensees to timely construct an ESMR system, thereby avoiding the " warehousing " of spectrum.

C. Non-ESMR Incumbents Currently Located in the ESMR Portion of the Band

29. In the *Supplemental Order*, the Commission declined to permit non-ESMR operation in the ESMR band segment.[58] The Commission stated that allowing such operations would undercut the basic tenet of this proceeding: that incompatible "high-site" non-ESMR technology must be segregated from "low-site" ESMR technology if unacceptable interference is to be avoided.[59] Communications & Industrial Electronics, Inc. (C&I) and North Sight Communications, Inc. (North Sight) have filed a joint request for clarification of the *Supplemental Order* on the status of incumbents that currently operate in

(Continued from previous page) ———————————
Telecommunications Bureau to Enhance its Universal Licensing System to More Accurately Reflect Termination of Unconstructed Licenses, *Public Notice,* 20 FCC Rcd 1455 (WTB 2005). The certification, which must be signed by a licensee principal, must be sent to the Chief, Wireless Telecommunications Bureau, Federal Communications Commiss 445 12th Street, S.W. Washington, DC 20554.

[55] *See* 47 C.F.R. § 1.946(c).

[56] This is similar to the manner in which the Commission treated additional unencumbered white area available from non-ESMR EA licensees relocating to the ESMR Band. Specifically, in the *Supplemental Order,* the Commission emphasized that the "white area" a non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the "white area" that existed before it relocated. Thus any additional unencumbered area in the EA which exists after the non-ESMR EA licensee is relocated will be available for use by Nextel. *See Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

[57] *See* ¶ 8 *supra.*

[58] *See Supplemental Order*, 19 FCC Rcd 25156 ¶ 81.

[59] *Id.*

the ESMR portion of the band but are currently operating non-ESMR systems.[60] C&I and North Sight argue that the Commission's prohibition on non-ESMRs operating in the ESMR band should apply only to entities *relocating* into the ESMR band, and not to current incumbents operating there.[61]

30. We deny the C&I/North Sight petition to the extent it asks us to hold that incumbent "high site" systems operating on the Upper 200 channels may remain there and be protected against interference from ESMR systems. Allowing such incumbent high-site systems to remain in the band is inconsistent with the fundamental interference abatement goals of this proceeding, which dictate that incompatible technologies should not operate in the same segment of the 800 MHz band. Accordingly, we clarify that no incumbent licensee in the ESMR band may continue to operate "high site" systems in the ESMR band. We also clarify that, if such licensees wish to continue their "high site" operations, they must relocate to comparable facilities in the non-ESMR band at Nextel's expense, consistent with the terms of the *800 MHz R&O* and *Supplemental Order*.

31. We note, however, that North Sight is not required to relocate out of the ESMR band under this holding. The petition indicates that North Sight operates an iDEN cellular-architecture technology system on its EA authorizations in the ESMR band, coupled with site-based stations operating below the ESMR band.[62] Thus, under our clarification of the rules discussed in paragraphs 7-8, *supra*, North Sight's system qualifies as a cellular system that may operate in the ESMR band.

D. Prohibition on "High Density" Cellular Systems in the Non-ESMR Portion of the 800 MHz Band

32. Coastal and SAFE argue that the initial *800 MHz NPRM* did not provide adequate notice under Section 553 of the Administrative Procedure Act (APA)[63] because the *800 MHz NPRM* did not apprise SMR licensees of the impact on current service resulting from band reconfiguration, *i.e.*, that limits would be imposed on the type of system architecture that SMR licensees could employ. Specifically, Coastal and SAFE allege that there was not adequate notice that the Commission would eliminate licensee discretion to convert from high-site SMR operations to high-density configurations.[64] We disagree with their argument. The limitation on use of high-density cellular operations was part of the concept of spectral separation to abate unacceptable interference, a concept that was placed at issue in the original Nextel "White Paper."[65] In the *800 MHz NPRM*, in which the Commission addressed many of the issues raised in the Nextel White Paper, parties were put on notice that the imperative to abate unacceptable interference to public safety systems would likely result in substantial changes to the rules affecting the 800 MHz band. In particular, the Commission signaled that reconfiguration of the

[60] *See* Request for Clarification of Communications & Industrial Electronics, Inc. and North Sight Communications, Inc. filed May 4, 2005 (C&I/North Sight Clarification Request).

[61] *Id.* at 4-5.

[62] *Id.* at 2-3.

[63] 5 U.S.C. § 553.

[64] *See* Coastal PFR (of R&O) at 7-12; *see also* SAFE/Coastal Reply at 2-3.

[65] *See* Promoting Public Safety Communications – Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Public Safety Needs, filed by Nextel Communications, Inc., on Nov. 21, 2001 (Nextel White Paper).

band into non-ESMR and ESMR segments was a foreseeable outcome of the proceeding.[66] The Commission also sought comment on a restructuring of the 800 MHz band that would have required some incumbent site-based licensees—such as Coastal and SAFE—to vacate the 800 MHz band entirely and relocate to the 900 MHz band at their own expense.[67] The Commission also raised the possibility that 800 MHz site-based incumbents might be required to operate on a secondary basis to public safety systems.[68]

33. Thus, both the broad scope of the *800 MHz NPRM* and the specific proposals offered within it made clear that altering what Coastal and SAFE claim are the "rights" of conventional SMR licensees was at issue and ripe for comment in order to achieve the Commission's goal of resolving unacceptable interference to public safety systems operating in the 800 MHz band.[69] Moreover, the Commission specifically invited comment on the Consensus Parties' proposed division of the 800 MHz band into non-ESMR and ESMR segments.[70] The Commission also sought further comment on this spectral separation proposal when the Consensus Parties incorporated the proposal in a subsequent filing.[71]

34. In fact, the Commission received and considered comments in support of the Consensus Parties' band reconfiguration proposal from, among others, Skitronics—a member of the SAFE

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[66] *See 800 MHz NPRM*, 17 FCC Rcd at 4884-89 ¶¶ 20-28.

[67] *Id.*, 17 FCC Rcd at 4893-95 ¶¶ 34-37.

[68] *Id.* 17 FCC Rcd at 4893 ¶ 34.

[69] Federal courts have also held that the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the proposed rule. *See* 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Memorandum Opinion and Order*, 14 FCC Rcd. 17525 at 17534 ¶24 *citing Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990). A rule is a logical outgrowth of a Notice if "[the party] should have anticipated that such a requirement might be imposed." *See* Provision of Aeronautical Services via the Inmarsat System-Aeronautical Radio, Inc. and the Air Transport Association of America Request for Waiver, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 5330 at 5336 ¶ 14 *citing Small Refiner Lead Phase-Down v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). In order to meet this standard, it has been held that the agency's notice and the public's comments must pass the "reasonable specificity" test. This standard can be stated as whether a reasonable person would be put on notice of the final rule. *See* 1998 Regulatory Review, *Order on Reconsideration*, 15 FCC Rcd 9707 at 9710 ¶ 7 *citing Smaller Refiner Lead Phase-Down v. EPA*, 705 F.2d at 549; *LaMadrid v. Hegstrom*, 830 F.2d 1524, 1530-31 (9th Cir. 1987); and The Logical Outgrowth Doctrine in Rulemaking, Phillip M. Kannan, 48 Admin. L. Rev. Spring 1996, at 213.

[70] The Consensus Parties were comprised of Nextel, the major public safety organizations, and various private wireless organizations. *See 800 MHz R&O*, 19 FCC Rcd at 14974 n. 13. They first submitted the "Consensus Plan" on August 7, 2002, during the reply comment cycle of this rule making proceeding. The Wireless Bureau then sought comment on the Consensus Plan. *See* Wireless Telecommunications Bureau Seeks Comment on "Consensus Plan" Filed in the 800 MHz Public Safety Interference Proceeding, *Public Notice*, 17 FCC Rcd 16755 (WTB 2002).

[71] On December 24, 2002, the Consensus Parties filed Supplemental Comments. Thereafter, the Commission sought comment on these Supplemental Comments. *See* Wireless Telecommunications Bureau Seeks Comment on "Supplemental Comments of the Consensus Parties" Filed in the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, 18 FCC Rcd 30 (WTB 2003). This *Public Notice* was also published in the Federal Register. *See* 68 FR 6687 (Feb. 10, 2003).

Coalition—which said it had "no problems with giving unqualified endorsement to" the Consensus Plan proposal to separate incompatible technologies in the 800 MHz band."[72] This filing undercuts the SAFE Coalition assertion that its members lacked adequate notice about the possibility that the Commission would adopt a band reconfiguration proposal.[73]

35. In sum, we believe that the extensive record of this proceeding reflects the fact that the Commission carefully ensured that parties were made aware of the possible outcomes of the proceeding as it progressed. We also note that—the SAFE Coalition's and Coastal's claims of inadequate notice notwithstanding—other conventional SMR licensees recognized, and commented upon, the possibility that cellular architecture would not be allowed to coexist with public safety's "high site" architecture in the same portion of the 800 MHz band.74 Accordingly, we conclude that the Commission properly discharged its duty to let all interested parties know the possible outcomes of this proceeding, and we find no merit in the SAFE Coalition's and Coastal's claims to the contrary.

E. Comparable Facilities

36. In the *800 MHz R&O,* the Commission declared that relocating licensees would be entitled to "comparable facilities."[75] However, the SAFE Coalition and Coastal argue that "comparable facilities" should mean more than "comparable equipment," it should guarantee post-reconfiguration replication of a licensee's service area and spectrum capacity.[76] They contend that in order to achieve service area replication, we must, prior to assigning replacement frequencies, undertake a technical study, analogous to the study the Commission conducted in establishing the Digital Television (DTV) Table of Allotments, and adopt a similar table for the 800 MHz land mobile band.[77]

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[72] *See* Comments of Skitronics, LLC, filed Feb. 25, 2003. The record also demonstrates that other conventional SMR licensees participated in this round of comments. *See, e.g.,* Comments of Silver Palm filed April 8, 2004.

[73] Even after the Commission adopted the *800 MHz R&O*, it released a *Public Notice* seeking comment on *ex parte* requests for clarification of the *800 MHz R&O*, including the conditions under which non-ESMR systems could be retuned to the ESMR band. *See* Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, 19 FCC Rcd 21492 (2004). This *Public Notice* was subsequently published in the Federal Register. *See* 69 FR 67880 (2004). In response the Commission received and considered separately filed comments from SAFE coalition members Coastal and Skitronics. *See* Comments of Coastal SMR Network, L.L.C., filed Dec. 2, 2004; Comments of Mobile Relay Associates and Skitronics, LLC, filed Dec. 2, 2004.

[74] For example, the American Mobile Telecommunications Association, a signatory to the Consensus Plan which also represents the interests of trunked and conventional SMR operators in the 800 MHz band, urged the Commission to adopt the Consensus Plan to alleviate interference to public safety but also recommended that the Commission ensure that entities interested in deploying cellular technology are treated equitably. *See* American Mobile Telecommunications Association Comments at 5, filed Sep. 23, 2002. *See also* Mobile Relay Associates Supplemental Comments at 19, filed Feb. 10, 2003 (opposing proposed restriction on conventional SMRs converting to cellular technology).

[75] *See 800 MHz R&O,* 19 FCC Rcd at 15076-77 ¶ 201.

[76] *See* Coastal PFR (of R&O) at 3-4; *see also* SAFE/Coastal Reply at 4-5.

[77] *Id.*

37. The *800 MHz R&O* did not say that the "comparable facilities" requirement was satisfied merely by providing the relocating licensee with comparable equipment. The *800 MHz R&O* stated that:

> Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs.[78]

38. Petitioners have failed to present facts that convince us that the comparable facilities standard, which has been successfully used in prior band reconfiguration efforts,[79] is somehow inappropriate here. Use of the comparable facilities standard in connection with 800 MHz band reconfiguration has been endorsed by public safety, CII and private radio interests, and by Nextel, in the *Consensus Parties Proposal*.[80] The Commission had an extensive record before it when it applied the comparable facilities standard to 800 MHz band reconfiguration, and the standard has been judicially approved in connection with relocation of incumbents in other contexts.[81] Accordingly, we find that the Commission did not act arbitrarily or capriciously when it decided that the comparable facilities standard should apply when incumbents are relocated within the 800 MHz band.

39. While we do not preclude the possibility that an engineering analysis may be appropriate in determining what constitutes comparable facilities in a specific case, we are also not persuaded by petitioners' contention that the Commission must first conduct a market-by-market analysis and derive a Table of Allotments for the 800 MHz band before the TA can assign replacement frequencies.[82] Petitioners have not identified any deficiencies in long-standing licensing process for 800 MHz land mobile facilities that would merit changing to a Ta of Allotments licensing scheme, and we are unable to see how the cost and delay inherent in making such a fundamental licensing change in this case could

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[78] *See 800 MHz R&O*, 19 FCC Rcd at 15076-77 ¶ 201.

[79] The comparable facilities standard was applied to a previous reconfiguration of the 800 MHz band when Nextel relocated incumbents from the Upper 200 channels. *See* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket 93-144, *Second Report and Order*, 12 FCC Rcd 19079 (1997) (establishing a standard for comparable facilities based on (1) a comparable system; (2) equivalent channel capacity; (2) same quality of service; and (3) comparable operating costs). The standard was also applied in other contexts, *e.g.* when fixed microwave systems were relocated to make way for Personal Communications Service (PCS) systems. *See* Amendment to the Commissions Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket 95-157, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825 (1996) (establishing a standard for comparable facilities based on throughput, system reliability, and operating costs).

[80] *See* Supplemental Comments of the Consensus Parties, *ex parte* filing dated Dec. 24, 2002).

[81] *See, e.g., Teledesic, LLC v. FCC*, 275 F.3d 75, 85-86 (D.C. Cir. 2001); *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001) (denying in part and dismissing in part petition for review of relocation regime in which displaced incumbents would be given comparable facilities to ensure a seamless transition); *Association of Public Safety Communications Officials-International, Inc., v. FCC*, 76 F.3d 395, 399 (D.C. Cir. 1996) (upholding the elimination of an exemption for public safety incumbents from a relocation regime in which emerging technology licensees would pay all costs associated with relocating incumbents to comparable facilities).

[82] *See* Coastal PFR (of R&O) at 4.

be justified. We note that the 800 MHz land mobile band has a far greater number of facilities and channels than the television band, a factor that would make a Table of Allotments far more costly to implement.[83] Moreover, compared to the television band, where the channel assignments are relatively static, the 800 MHz land mobile band is highly dynamic, with large numbers of applications for new licenses and modifications of existing licenses filed each day. Thus, any Table of Allotments for the band would require continuous modification to track licensing activity in the band, at a considerable and continuing cost.[84]

40. We also believe that petitioners' apparent primary concern, that incumbent relocating licensees would not receive replication of their previous service areas, has adequately been addressed by the safeguards provided for incumbents in the *800 MHz R&O*. First, a relocating incumbent may conduct an independent technical study to verify that a replacement channel is comparable to its former channel.[85] Second, if a dispute arises concerning the comparability of a new channel, the licensee has recourse to the TA and alternative dispute resolution to settle the matter.[86] Third, if an incumbent licensee believes that, despite these protections, it is not being provided with comparable facilities, it may seek *de novo* review from the Commission.[87] These protections afforded relocating incumbents in the *800 MHz R&O* makes us confident that incumbents will be fairly treated. Accordingly, we are denying the SAFE Coalition and Coastal petitions for reconsideration to the extent petitioners seek revision of that portion of the *800 MHz R&O* that deals with the right of relocating incumbents to receive comparable facilities.

F. Frequency Coordination

41. In the *Supplemental Order*, the Commission held that evidence of frequency coordination, normally required for license modification applications in the 800 MHz band, is not necessary or required for modification applications filed to implement band reconfiguration.[88] Several parties seek reconsideration of that determination, contending that frequency coordination is essential here because it

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[83] For example, a search of the Universal Licensing System database shows that over 8100 800 MHz applications were filed during the six months prior to the adoption of the *800 MHz R&O* (January 1, 2004-July 1, 2004).

[84] Indeed, were the television Table of Allotments model followed, every 800 MHz licensee desiring to change its assignment would have to file a petition for rule making and the Commission would have to initiate a comment cycle and prepare and issue an order, which then would be subject to petitions for reconsideration, applications for review and judicial appeal. The burden on licensees and the Commission, alike, would be substantial and to no advantageous purpose. *Cf.* 47 C.F.R. §§ 1.401-1.407.

[85] *See 800 MHz R&O*, 19 FCC Rcd at 15075-77 ¶ 201. The TA must adhere to the Commission's minimum seventy mile co-channel spacing requirements, except when the applicable technical parameters permit a reduced spacing of up to fifty-five miles, or less than fifty-five miles with the consent of the co-channel licensees. As with the rules for applications for new licenses, the TA need not consider adjacent channel stations when specifying a replacement channel. *See* 47 C.F.R. § 90.621(b).

[86] *See 800 MHz R&O*, 19 FCC Rcd at 15071-72 ¶ 194.

[87] *Id.*

[88] *See Supplemental Order*, 19 FCC Rcd at 25146 ¶ 60, 25148 ¶¶ 65-66. Frequency coordination, however, is required for modification applications requesting major modifications other than adding frequencies specified by the TA to implement band reconfiguration. *See id.* 19 FCC Rcd 25146 at n.132.

provides individual licensees an additional layer of protection against "diminished" communications.[89] These petitioners also argue that the frequency coordinators have efficient application processing systems that can help speed the rebanding process.[90]

42. As an initial matter, we generally agree with these parties' characterization of the benefits of frequency coordination, and we emphasize that the Commission anticipated that frequency coordinators could play an important role in 800 MHz band reconfiguration. Thus, the Commission did not prohibit frequency coordinators from participation in the rebanding process, and the TA is free to use a third party or parties, including Part 90 frequency coordinators, to determine the most appropriate replacement channels.[91] Also, licensees are free to use the services of frequency coordinators or other entities to file applications on their behalf.[92] However, we do not believe that frequency coordination is a necessity, particularly in the case of the National Public Safety Planning Advisory Committee (NPSPAC) channels where all NPSPAC licensees are being relocated to channels fifteen megahertz below their current operating channels, thus exactly preserving the coverage/interference environment in the old and new NPSPAC bands.[93] In that case, we believe that requiring frequency coordination would be unnecessary and might delay band reconfiguration. Additionally, we expect that the TA will make replacement channel assignments in a manner that assures comparable facilities and could utilize the services of frequency coordinators if it desired.[94] If a licensee is dissatisfied with its channel assignment and contests the TA's comparable facilities determination, it can enlist the services of a frequency coordinator to assist it in reviewing the TA's determination or seek *de novo* review from the Commission. We therefore decline to mandate frequency coordination for all relocation applications.

G. Expansion Band Issues

43. The Commission designated the 815-816 MHz/860-861 MHz segment of the 800 MHz band as an Expansion Band intended to provide public safety licensees spectral separation from the ESMR band segment. Although the Commission provided Expansion Band licensees full protection against unacceptable interference, public safety licensees currently located in the Expansion Band have the option to relocate below the Expansion Band, at Nextel's expense, and no public safety licensee will be forced to relocate into or remain in the Expansion Band.[95] The Commission did not extend either relocation option to CII licensees, however.

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[89] *See* Petition for Partial Reconsideration of Supplemental Order and Order on Reconsideration, filed by the Association of Public-Safety Communications Officials International, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, filed Feb. 1, 2005 (APCO PFR (of Supplemental Order)) at 4.

[90] *Id.* at 2.

[91] *See 800 MHz R&O,* 19 FCC Rcd at 15071 n.517A.

[92] *Id.*, 19 FCC Rcd at 15075 n.520.

[93] *See Supplemental Order*, 19 FCC Rcd at 25148 ¶ 65. The NPSPAC channels are six megahertz of spectrum designated for exclusive public safety use. *See 800 MHz R&O,* 19 FCC Rcd at 14991 ¶ 37.

[94] *See id.*, 19 FCC Rcd at 25146 ¶ 60.

[95] *See 800 MHz R&O,* 19 FCC Rcd at 15053 ¶ 154.

1. Critical Infrastructure Industry (CII) Relocation

44. Entergy argues that CII entities should be allowed to relocate their facilities out of the Expansion Band on the same basis as public safety licensees and that they should have the same rights as public safety licensees not to be relocated into the Expansion Band. It argues that the Commission intended the Expansion Band to be used as a haven for licensees that employ "campus-type"' or similar interference-resistant systems and that the majority of CII licensees do not employ campus-type systems.[96] Although the Commission stated in the *800 MHz R&O* that certain licensees might wish to activate campus-type systems in the Expansion Band,[97] it did not limit the use of the band to campus-type systems or suggest that the band was unsuitable for non "campus-type" operations.

45. We do not agree with the argument that, because CII communications may, on occasion, relate to the safety of life and property, CII licensees should have the identical rights in the Expansion Band as public safety licensees.[98] Because CII licensees in the Expansion Band receive full protection against unacceptable interference after band reconfiguration,[99] and because the realities of band reconfiguration are such that we cannot guarantee both public safety and CII equivalent spectral separation from the ESMR band without comprising band reconfiguration, we decline to alter the parameters of the Expansion Band as they apply to CII licensees. We note that our decision in this regard is consistent with our decision in the spectrum refarming proceeding to afford public safety and CII licensees certain protections relative to frequency coordination, but not to place them under identical frequency coordination regimes.[100] There, as here, we concluded that differential treatment of public safety and CII was appropriate because CII licensees' communications are not primarily related to the safety of life and property.[101] Thus, we deny the Entergy petition.

2. Expansion Band in Atlanta

46. In the *800 MHz R&O*, the Commission found that the ESMR band segment boundaries adopted for most of the United States are too restrictive to accommodate both SouthernLINC and Nextel in the area of the southeastern United States in which SouthernLINC operates, because an inadequate number of channels exist in the 816-824/861-869 MHz band segment to replicate both companies' existing channel capacity.[102] Accordingly, the Commission expanded the ESMR band segment in the

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[96] *See* Petition for Reconsideration of Entergy Corporation and Entergy Services, Inc. (Entergy), filed Dec. 22, 2004 (Entergy PFR (of R&O)) at 5-6 *citing 800 MHz R&O*, 19 FCC Rcd at 15053 ¶ 154.

[97] *See 800 MHz R&O,* 19 FCC Rcd at 15053 ¶ 154.

[98] *See* Entergy PFR (of R&O) at 5.

[99] The full protection is afforded after band reconfiguration is completed in a given NPSPAC region; in the interim, such licensees are provided a lesser level of protection. *See* ¶ 50, *infra.*

[100] *See* Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, PR Docket 92-235, *Second Report and Order,* 12 FCC Rcd 14307 at 14327-29 ¶¶ 37-41 (1997).

[101] *Id.*

[102] *See 800 MHz R&O*, 19 FCC Rcd at 15057 ¶ 164.

southeastern United States to the 813.5-824 MHz/858.5-869 MHz segment.[103] As a result, there is no Guard Band in this area and the Expansion Band encompasses 812.5-813.5 MHz/857.5-858.5 MHz.[104]

47. In its petition for reconsideration, SouthernLINC asks us to eliminate the Expansion Band within a seventy mile radius of Atlanta, Georgia, or, alternatively, to reduce the Expansion Band in Atlanta to one-half megahertz at 813-813.5 MHz/858-858.5 MHz.[105] In support of its petition, SouthernLINC offers evidence that in the Atlanta area, it will be impossible to relocate public safety licensees currently operating in the Expansion Band to channels vacated by B/ILT licensees moving into the Expansion Band because there are too few B/ILT licensees in the interleaved spectrum.[106] SouthernLINC contends that either proposal will accommodate all incumbents, but notes that under its alternative proposal, all non-public safety incumbents operating in the interleaved portion of the band will have to accept relocation to the Expansion Band.[107]

48. SouthernLINC has not persuaded us that we should eliminate the Expansion Band altogether. We have studied the incumbency situation in Atlanta, however, and find it sufficiently different from the rest of the United States to merit reducing the Expansion Band to one-half megahertz within a seventy mile radius of Atlanta. We believe that retaining a portion of the Expansion Band is important to afford public safety some spectral separation from the ESMR portion of the band, which is particularly important because of the lack of a Guard Band in the Atlanta region.[108] We believe that careful choice of the location of public safety channels in the band may mitigate interference problems. We therefore direct the TA to survey public safety licensees in the affected area and to ascertain which systems, and which channels within those systems, are used primarily to carry mission-critical communications, as opposed to administrative traffic. Based on the information obtained, the TA shall endeavor to relocate the channels carrying mission-critical communications as far as feasible below the Expansion Band. Accordingly, we update Section 90.617 to reflect the distribution of channels between the various pool categories in the SouthernLINC/Nextel counties.[109]

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[103] *Id.*

[104] *Id.*, 19 FCC Rcd at 15058 ¶ 166.

[105] *See* Petition for Reconsideration of Southern Communications Services, Inc. d/b/a/ SouthernLINC filed December 22, 2004 (SouthernLINC PFR (of R&O)) at 3. *See also* Comments on Petitions for Reconsideration of Southern Communications Services, Inc. d/b/a/ SouthernLINC filed April 21, 2005 (SouthernLINC Comments on PFR) at 3.

[106] *See generally* SouthernLINC PFR (of R&O). Public safety systems represent over eighty-five percent of all incumbent systems that must be relocated in the Atlanta area. Thus a "one-for-one" channel swap that moves public safety incumbents out of the Expansion Band and non-public safety incumbents into the Expansion Band is not possible. *Id.* at 4. *See also* SouthernLINC Comments on PFR at 3.

[107] *Id.* at 4-5.

[108] *See 800 MHz R&O*, 19 FCC Rcd at 15058 ¶ 166. No Guard Band was included in the band plan for the SouthernLINC markets. *Id.*

[109] *See* § 90.617 (as amended in Appendix B *infra*). We also note that when the Commission updated its rules to reflect the reconfigured band plan in the 800 MHz band it inadvertently omitted the mutual aid channels from § 90.617(a). Therefore, we insert a reference to the mutual aid channels into § 90.617(a)(1) and note their new channel numbers based on the reconfigured band plan.

49. We realize that under this band plan, some Atlanta-based B/ILT incumbents that would otherwise not be required to change frequencies will be required to relocate to the Expansion Band. We believe this is a necessary concession for maintaining adequate protection of public safety systems against unacceptable interference and that it will not unduly disadvantage B/ILT licensees because the rules guarantee all stations in the Expansion Band full protection against unacceptable interference.[110]

H. Operational Issues

1. Interim Interference Values

50. In the *800 MHz R&O*, the Commission adopted minimum signal strength threshold values (-101 dBm (portable) and -104 dBm (mobile)) that non-cellular systems must maintain to qualify for full interference protection.[111] The Commission further provided that if a non-cellular 800 MHz licensee encounters a degradation of carrier to noise ratio below 20 db in areas in which its received power level is at or above the relevant threshold value, the source or sources of the interfering signal are jointly and severally responsible for abating the interference.[112] In the *Supplemental Order*, the Commission modified this interference standard on an interim basis in response to a showing by Nextel that imposing the final standard prior to the completion of band reconfiguration would result in a material restriction in the service afforded to subscribers.[113] Accordingly, the Commission established an interim standard whereby non-cellular systems must achieve signal strength threshold levels of -85 dBm (portable) or -88 dBm (mobile) in order to be entitled to full interference protection. The Commission provided that this interim standard would apply in each NPSPAC region until completion of band reconfiguration in that region, whereupon the more stringent threshold levels would take effect.[114]

51. The Tri-State Radio Planning Committee (Tri-State) urges us to apply the final rather than the interim standard to stations that will continue operating in the original NPSPAC band (821-824 MHz/866-869 MHz) while band reconfiguration is completed in a given region. Tri-State asserts that the NPSPAC channels will not encounter undue amounts of interference because they are not interleaved with channels used by licensees employing cellular-architecture systems.[115] Tri-State submits drive-test data purporting to show that application of the interim standard to its system would reduce the area

[110] 47 C.F.R. §§ 90.672, 90.673, 90.674.

[111] *See 800 MHz R&O*, 19 FCC Rcd at 15030 ¶ 106.

[112] *See* 47 C.F.R. § 90.673.

[113] *See Supplemental Order*, 19 FCC Rcd at 25137 ¶ 38 *citing* Letter, dated Sep. 28, 2004, from Lawrence R. Krevor, Vice-President Government Affairs, Nextel, to Marlene H. Dortch, Secretary, FCC at 1-5.

[114] *See Supplemental Order*, 19 FCC Rcd at 25137-38 ¶ 39. We note that the interim levels were supported by several commercial, private and public safety members of the 800 MHz community. *Id.*

[115] *See* Letter, dated Jan. 20, 2005, from Peter Meade, Chairman, Region 8 to Marlene Dortch, Secretary, Federal Communications Commission (Tri-State PFR (of Supplemental Order)). *See also* Letter, dated Apr. 28, 2005, from Peter Meade, Chairman, Region 8 to Marlene Dortch, Secretary, Federal Communications Commission (Tri-State Reply).

where Tri-State is eligible for full interference protection from ninety-three percent (under the final standard) to sixty-six percent of its service area (under the interim standard).[116]

52. We continue to believe that applying the interim standard in the original NPSPAC band during band reconfiguration appropriate. Although, as Tri-State points out, the original NPSPAC block is not interleaved with channels used by cellular architecture systems, there are Part 22 Cellular Radiotelephone systems and ESMR systems operating on adjacent channels above and below the NPSPAC block whose ability to adequately serve their subscribers could be affected during band reconfiguration if the final interference standard, as opposed to the interim standard, were implemented immediately.[117] Moreover, pursuant to provisions contained in the *Supplemental Order,* Tri-State's public safety system is entitled to protection from unacceptable interference in areas where its system does not meet the interim signal strength threshold but does meet the final signal strength threshold values adopted in the *800 MHz R&O.*[118] These provisions require CMRS carriers to mitigate unacceptable interference on public safety control channels and exercise best efforts to mitigate CMRS/public safety interference on public safety voice channels.[119] Finally, we note that, since Tri-State is located in Wave 1 of the band reconfiguration schedule, it is in one of the first NPSPAC regions to complete band reconfiguration and therefore, will be subject to a rapid transition from the interim standards to the final standards established in the *800 MHz R&O.*[120] We therefore deny Tri-State's request to make the interim standards inapplicable to stations operating in the current NPSPAC block.

53. The American Petroleum Institute and the United Telecom Council (API/UTC) ask that we extend to all PLMR licensees, or, in the alternative, only to CII licensees, the protections that the Commission provided to public safety systems that do not meet the -85 dBm (portable) or -88 dBm (mobile) interim threshold values but do meet the minimum threshold values adopted in the *800 MHz R&O.*[121] Citing budgetary constraints and unwieldy budget processes, API and UTC argue that non-public safety PLMR licensees should not have to implement costly system upgrades merely to be eligible for transitional interference protection under the interim standards.[122] After carefully considering API's and UTC's contentions, we continue to find that the balance struck by the Commission in the *Supplemental Order* should be retained. Relative to public safety entities, CII entities have greater financial resources and budgetary latitude to address temporary interference issues that may not be fully addressed by the interim standard used during rebanding. Therefore, we reaffirm that only facilities directly used for police, fire, emergency medical services, and other governmental uses involving safety

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[116] *See* Attachment to Tri-State PFR (of Supplemental Order).

[117] *See 800 MHz R&O,* 19 FCC Rcd at 15023-24 ¶ 91.

[118] *Id.*, 19 FCC Rcd 25139-40 ¶ 42.

[119] *Id.*

[120] *See* Regional Prioritization Plan of the 800 MHz Transition Administrator at 23-24 (Jan. 31, 2005). The Commission charged the TA with developing a relocation schedule on a NPSPAC region-by-region basis, prioritizing the regions on the basis of population and interference. *See also 800 MHz R&O*, 19 FCC Rcd 15072 ¶ 195.

[121] *See* Petition for Reconsideration of the American Petroleum Institute and the United Telecom Council, filed Mar. 10, 2005 (API/UTC PFR (of Supplemental Order)) at 3-9.

[122] *Id.*

of life and property will be afforded additional interference protection even if they do not meet the interim threshold values.

54. For similar reasons, we decline to adopt Entergy's proposal that we provide CII entities with an interference "safety valve" analogous to what the Commission established for public safety entities.[123] The Commission adopted the "safety valve" to address the infrequent but highly critical circumstance in which a qualified governmental official charged with protection of safety of life and property perceives that interference poses an imminent threat to life or property.[124] Under such extraordinary circumstances, the *800 MHz R&O* provides that a CMRS provider may be required to immediately discontinue operation of any suspected interference source. Given the extraordinary nature of this remedy and the potential impact it may have on CMRS providers, we believe it is appropriate to limit its use to public safety officials, whose primary charge is the protection of life and property. We therefore deny the API/UTC petition for reconsideration.

55. On a related matter, we deny CTIA's petition to relieve cellular and ESMR carriers of the obligation to investigate interference complaints or take corrective action if complaining licensees fail to cooperate.[125] In the *800 MHz R&O*, the Commission stated that all parties involved in an interference incident, including public safety and CII licensees, are under an affirmative duty to act in good faith in resolving an interference dispute. This good faith requirement includes "without limitation, the obligation to timely meet appointments and provide whatever technical assistance is appropriate under the circumstances."[126] We reaffirm the Commission's commitment that it "will neither hesitate to act when the obligation of good faith is breached nor sanction any disingenuous allegations that the good faith obligation has been breached."[127] In this connection, we note that whether a party is acting in good faith is necessarily a matter that we will decide on a case-by-case basis. We are unwilling to place the determination of whether a complaining party is cooperating or not in the hands of the party making the allegation of non-cooperation. Thus, until and unless we determine that a licensee is acting in bad faith; both parties to an interference incident remain obliged to take all reasonable measures to cooperate in its resolution.

2. Minimum Receiver Performance Criteria

56. Non-cellular licensees in the 800 MHz band must use receivers with minimum performance standards in order to be entitled to full protection against unacceptable interference.[128] The performance values the Commission chose in the *800 MHz R&O* were based on the expected performance from affordable public safety and CII radios.[129] Consolidated Edison Company of New York, Inc. (ConEd) seeks reconsideration of the minimum receiver performance standards, arguing that it purchased

[123] *See* Entergy PFR (of R&O) at 5-7.

[124] *See 800 MHZ R&O*, 19 FCC Rcd at 15044-45 ¶ 140.

[125] *See* CTIA PFR (of R&O) at 4.

[126] *See 800 MHz R&O*, 19 FCC Rcd at 15043 ¶¶ 137-138.

[127] *Supplemental Order*, 19 FCC Rcd at 25143 ¶ 50.

[128] *See 800 MHz R&O*, 19 FCC Rcd at 15032 ¶¶ 109-110.

[129] *Id.*

approximately 3,300 mobile/portable units for operation on its Motorola iDEN system that fall short of these standards.[130] ConEd contends that, at the time it purchased its equipment, receivers that satisfied the minimum performance standard were unavailable for its iDEN system.[131]

57. As an initial matter, we note that the rules do not regulate receiver performance standards *per se*, but only set a benchmark against which entitlement to interference protection may be measured. Thus, nothing in the rules prohibits ConEd from continuing to use the radios it purchased. Secondly, receiver performance comes into play only in the circumstance in which systems not employing cellular architecture encounter interference.[132] ConEd's iDEN system, however, is a cellular architecture system. Cellular architecture systems employ frequency reuse and are interference-limited within the system, *i.e.*, the predominant source of interference to a cellular architecture system is cells within the system itself. Thus, typically, before a receiver in such a system becomes affected by interference from another cell on the same frequency—or from an external interference source—it is "handed-off" to another cell on another frequency. In recognition of that fact, the *800 MHz R&O* made no changes to the rules governing interference to cellular architecture systems. Therefore, we see no reason to change the rules for interference protection to non-cellular systems to accommodate the characteristics of cellular architecture receivers and are denying ConEd's petition for reconsideration.

58. We note that our decision not to factor the performance characteristics of cellular architecture receivers into the interference equation does not mean that non-cellular, *e.g.*, public safety, systems using receivers that do not meet the performance standards for obtaining maximum protection against interference are entirely without protection. The Commission recognized that such licensees may employ older radios that fail to conform to the performance threshold standard.[133] In such a case, the licensee is afforded interference protection, but subject to a proportionately higher received signal threshold: for each one dB by which the receiver does not meet the performance standard, there is a one dB increase in the -104 dBm (mobile) or -101 dBm (portable) signal strength threshold.[134]

I. 1.9 GHz Band

59. In the *800 MHz R&O*, the Commission concluded that Nextel should be compensated for the access to spectrum it will surrender and costs it will incur as a result of band reconfiguration by receiving access to operate on ten megahertz of spectrum, nationwide, in the 1910-1915 MHz and 1990-1995 MHz (1.9 GHz) bands.[135] In order to ensure that this did not result in an undeserved "windfall" to Nextel, the Commission assessed the relative market value of these 1.9 GHz spectrum rights against (a) the value of

[130] *See* Petition for Clarification and Reconsideration, filed Dec. 22, 2004, by Consolidated Edison Company of New York, Inc. (ConEd PFR (of R&O)) at 6. *See also* Reply to Opposition to Petitions for Clarification and Reconsideration, filed May 2, 2004, by Con Ed (ConEd Reply) at 2 (field testing reveals that their mobile units will actually meet the minimum intermodulation rejection requirements established in the *800 MHz R&O*).

[131] *See* ConEd PFR (of R&O) at 6-7.

[132] *See* 47 C.F.R. § 90.672.

[133] *See 800 MHz R&O*, 19 FCC Rcd 15033 ¶ 112.

[134] *Id.*

[135] *See 800 MHz R&O*, 19 FCC Rcd at 15080-81 ¶¶ 210-212.